

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

**NORMAN FRANCIS LINCOLN,
Plaintiff**

:

:

V.

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C.A. No. PM 99-342

:

**RHODE ISLAND HUMAN RIGHTS
COMMISSION, et al.,
Defendants**

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**OCCUPATIONAL HEALTH &
REHABILITATION, INC.,
Plaintiffs**

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:

:

V.

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:

**RHODE ISLAND HUMAN RIGHTS
COMMISSION, et al.,
Defendants**

DECISION

ISRAEL, J. These are consolidated administrative appeals by an employee, Norman Francis Lincoln, and an employer, Occupational Health & Rehabilitation, Inc., from a decision and order issued by the Commission for Human Rights on December 24, 1998. Each appeal was filed in this Court on January 22, 1999. This Court has jurisdiction pursuant to G.L. §§ 28-5-28 and 42-35-15.

On March 31, 1999, while these appeals were pending in this Court, the Supreme Court decided FUD's Inc. v. State, 727 A.2d 692 (R.I. 1999). In that case, the Supreme Court held that the Fair Employment Practices Act (FEPA), as then in effect, was unconstitutional because it deprived employers, such as the respondent in this case before the commission, a "right to elect either a hearing

before the commission or a Superior Court jury trial while granting this same right to employees.” Id., at page 698.

The Supreme Court deferred to the General Assembly to frame a cure for the constitutional infirmity in the remedial scheme provided in the FEPA. In response to that deference, on July 8, 1999, P.L. 1999, ch. 496 was enacted. It affords employers an equal opportunity to elect a jury trial in this Court rather than a hearing before the commission. Nevertheless, because this complaint was not pending before the commission on July 8, 1999, the effective date of the public law, this employer cannot be afforded the election provided in the statute to relieve the constitutional infirmity in his case.

This Court notes that § 2 of P.L. 1999, ch. 496 does provide, in pertinent part, that the act of amendment “shall not affect the right of any party in a case pending before the commission or on appeal to raise any constitutional issue relating to denial of a jury which issue was raised prior to the effective date (July 9, 1999) of this act.” (Emphasis supplied). This Court is satisfied that the issue of the constitutionality of the commission’s decision was “raised” by the employer’s appeal as filed on January 22, 1999. The specific nature of the employer’s constitutional claim was thereafter spelled out in detail in its memorandum filed on December 16, 1999, which under our practise was its first opportunity to argue its particular claim of lack of constitutionality. This Court finds that the statutory savings provision permits the employer to raise the issue in this proceeding.

The employer is quite mistaken that dismissal of the complaint is the relief to which it is entitled. The general assembly did not prescribe any method for employers in the situation of the employer in this case to make an election to obtain a jury trial in this Court. This Court does not see how this employer can be treated any differently from the similarly situated employer in FUD’s Inc., without denying it equal protection of the law. Both parties must be afforded their day in this Court.

Accordingly, the decision and order of the commission must be set aside and vacated. Either party may demand a jury trial in this Court on the employee's complaint of discrimination. Leave to amend pleadings and to conduct discovery will be liberally granted. The commission will forthwith issue a permission to sue letter to the employee, whereupon all further proceedings before the commission will be terminated.

A form of judgment will be presented for entry in each case by Occupational Health & Rehabilitation, Inc. after notice to all parties in each case.